UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

WYMAN GORDON PENNSYLVANIA, LLC	:	
	:	
AND	:	CASES 04-CA-182126,
	:	04-CA-186281, and
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	:	04-CA-188990

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE

A. Overview

This case is about employees' Section 7 rights to "join ... labor organizations, to bargain collectively through representatives of their own choosing and ... to refrain from any and all such activities." 29 U.S.C. § 157 (emphasis added) and the ALJ's substitution of his opinion over those rights. The Respondent-Employer, Wyman Gordon of Pennsylvania ("Respondent"), consistently respected those rights, and seeks to overturn the ALJ's decision, which contains both factual and legal errors, that subverts those rights.

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("Union") was certified after narrowly winning an election by a single vote. Respondent and Union thereafter bargained in good faith[1] over a fifteen month period, reaching ten tentative agreements. During that timeframe, employees who supported the Union continued to do so and employees who were against the Union continued to be so. Through the normal attrition and hiring of workers, there were several new employees who had not voted in the election. The balance tipped in favor of those employees who were against the Union and they presented Respondent with a petition demanding that Respondent withdraw recognition of the Union. Having lost the majority support of the employees, the Union subsequently claimed that Respondent's withdrawal was unlawful because the employees' petition was tainted by alleged unfair labor practices.

A hearing on the General Counsel's March 8, 2018 Complaint[2] was held on March 19, 20, April 23, 24 and 25, 2018. The ALJ issued his decision on July 13, 2018, in which he determined

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[1] The Regional Director specifically dismissed the Union's overall bad faith bargaining claim on March 1, 2017 and the decision was upheld on appeal.

[2] The General Counsel issued a Consolidated Complaint on September 29, 2017, which it amended on January 25, 2018, in response to Respondent's Motion for Bill of Particulars, and then

that the petition, which had been signed by 23 of the 43 bargaining unit members, was invalid, finding that only 15 of the 23 signatures were valid. In doing so, the ALJ wrongly disregarded the will of 8 employees where the evidence and circumstances support a finding that the petition was valid. Despite overwhelming evidence to the contrary, including admissions by the Union itself, the ALJ also found that Respondent refused to bargain over economic issues and refused to provide a comprehensive response to the Union's comprehensive proposal, and that these violations would have tainted any petition. Finally, the ALJ found that Respondent violated the Act when it refused to provide confidential sales and customer information requested by the Union.[3]

B. Questions Presented

1. Whether the ALJ erred in crediting Steve Brotzman's testimony over the testimony of all other witnesses and discrediting or ignoring the testimony of those witnesses (Exceptions 23-25; 29, 34, 41, 50)?

2. Whether the ALJ erred in determining that Respondent could not rely on the petition presented by bargaining unit members demanding withdrawal of recognition of the Union (Exceptions 4-52, 70)?

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an Amended Consolidated Complaint on February 13, 2018, which was then again amended on March 8, 2018.

[3] The ALJ: found that the Company's Confidentiality Statement violated the Act but that there was no basis for concluding the maintenance of the rule had a tendency to cause employees to become disaffected from the Union (Complaint ¶ 6); dismissed the claims relating to allegations that Respondent failed to meet at reasonable times (Complaint ¶ 7); concluded that the Employer's failure to commence bargaining over an interim wage increase prior to August 1, 2016, was a violation of Sections 8(a)(5) and (1) of the Act, but that the violation would not have tainted a valid decertification petition (Complaint ¶ 8); similarly, found that where Respondent did not adequately repudiate a violation involving application of its light duty policy, the violation would not have tainted a valid petition (Complaint ¶ 9); dismissed the allegation that Respondent unreasonably delayed in responding to the Union's information requests (except for the sales figures) (Complaint ¶ 11).

3. Whether the ALJ erred in concluding that Respondent committed unfair labor practice charges (Exceptions 1-3, 53-62, 65-68; 73-80)?

4. Whether the ALJ erred in concluding that, assuming Respondent committed one or more unfair labor practice charges, the charge(s) tainted the petition presented by the bargaining unit members demanding withdrawal of recognition of the Union (Exceptions 1, 3, 63-64, 69, 71)?

5. Whether the ALJ erred in recommending the Proposed Remedy and Order; whether if a remedy is warranted, that remedy should be an election (Exceptions 81-82)?

C. Factual Background

1. *The Election: 24 Employees Vote For the Union; 22 Against the Union*

On April 4, 2014, the Union filed a petition to represent "all full and part time production and maintenance employees" at Respondent's Tru Form plant in Plains, Pennsylvania. An election was held on May 21, 2014. Twenty-four employees voted for the Union, and twenty-two voted against. The Union was certified as the employees' exclusive bargaining representative on April 15, 2015.

2. *Negotiations Commenced*

Due to the Union's unavailability, negotiations did not commence until September 2015. On May 1, 2015, the Union's chief negotiator, Joe Pozza, sent a letter to Respondent requesting certain information. (Er. Ex. 4; Tr. 615:21-22). Rick Grimaldi, counsel and lead negotiator for Respondent, responded and let Pozza know that he was representing Respondent and would provide the information requested. (Tr. 703:21-25; 704:1-7). Pozza wrote a second letter to Respondent's General Manager at the time, Matt Troutman, to which Grimaldi again responded and directed Pozza to direct correspondence to him and provided twelve dates of availability to

begin negotiations. (Tr. 703:21-25; 704:1-7). Grimaldi provided the requested information via letter on June 26, 2015 and again reiterated his availability to begin negotiations, noting that he was awaiting Pozza's reply. (Er. Ex. 6). In addition to providing the responses to the Union's information requests, Grimaldi attempted to secure bargaining dates, but, due in part to Pozza's limited availability, the parties were unable to schedule any bargaining sessions until September 2015. (Er. Ex. 6; Tr. 615:18-23).

At the parties' first bargaining session, on September 17, 2015, the Union provided Respondent with a comprehensive proposal, which was essentially a duplicate of the Union's collective bargaining agreement from another plant – Mountain Top – combined with a few policies from Tru Form's handbook. (Tr. 86:21-24; 88:9-11). Respondent expressed on numerous occasions that it was not interested in duplicating the Mountain Top contract for various reasons, including that they were two different plants with different structure, different operations and different needs, and that there were problems with the Mountain Top contract. (Tr. 623:22-25; 624:2-12).

The parties spent the remainder of the first session negotiating ground rules which set the parameters for future bargaining sessions. (Tr. 620:11-18; 621:5-9). Those ground rules included that the parties would attempt to negotiate language before economics, a common approach in first contract situations such as this one. (GC Ex. 8; Tr. 621:21-25; 622:1-7). The ground rules also provided that the parties agreed to meet for a minimum of four hours at each bargaining session and that each party had the right to caucus at any time. (GC Ex. 8).

Contrary to the ALJ's finding, the record shows that, at the second bargaining session on October 15, 2015, the parties reviewed the Union's proposal, provision by provision, with Respondent providing the Union its position on each proposal. (Tr. 622:23-25; 623:1-8; 624:13-

20). Respondent never indicated at this session, or at any other, that it would not bargain over any of the provisions in the Union's proposal. (Tr. 626:5-7). Indeed, Union counsel Nate Kilbert testified, "I don't think Respondent ever said [it would never negotiate] with respect to any proposal that the Union had advanced." (Tr. 466:18-21) (*See also* Tr. 466:11-13).

3. *The Parties Bargained For Over a Year*

Between September 2015 and August 2016, the parties met thirteen times, including the two initial sessions described above. (Er. Ex. 3[4] at 1-56). They reached tentative agreements on three provisions (Bereavement Leave, Jury Duty, and Non-discrimination) and negotiated a wide variety of mandatory subjects of bargaining, including: Union Security, Dues Checkoffs, No Strike/No Lockout, Absenteeism and Tardiness, Plant Regulations, Management Rights, Shoe Allowance, Purpose and Intent, and Health Insurance. (Tr. 626:14-21; Er. Ex. 37-39; Er. Ex. 3 at 1-54).

In April 2016, Respondent notified the Union that the Company's medical insurance carrier was raising rates effective June 1, 2016, and, therefore, Respondent wished to negotiate health insurance prior to the completion of negotiation over language. (Er. Ex. 3 at 36; Tr. 542:15-25; 543:1-8). Given the time sensitive nature of the issue, Grimaldi offered multiple ways of meeting before the end of May to wrap up healthcare, such as by phone or exchanging proposals in between sessions, but Pozza again refused Respondent's suggestions. (Er. Ex. 3 at 44, 46). Grimaldi also offered to have a meeting at 7:00 a.m. sometime before the end of May, but Pozza responded that he "[couldn't] guarantee anything." (Er. Ex. 3 at 47). Pozza did not provide any proposals in the interim, nor did he agree to a 7:00 a.m. meeting. (Tr. 673:1-14). The parties failed to reach agreement prior to June 1, and Respondent maintained status quo – the percentage contributions by Respondent and employees remained the same. (Tr. 546:2-15).

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[4] In an effort to ease review of the cited record, a true and correct copy of Employer Exhibit 3 with page numbers added is attached.

During the next two sessions, on June 13 and July 12, Respondent continued to attempt to negotiate health care, but met a wall in Pozza who insisted that the Union "accepted what was implemented" and refused to engage in further bargaining over the subject. (Er. Ex. 3 at 48-56; Tr. 546:9-10). Respondent's last counter, dated July 12, 2016, remained without response throughout negotiations. (Tr. 545:11-17; Er. Ex. 53). Thereafter, the parties could not find a mutually convenient date to negotiate until August 12, 2016. (Er. Ex. 3 at 48-55).

On August 12, 2016, the parties began to negotiate the wage increase. (Er. Ex. 3 at 57). The Union's opening demand was unclear, as there was confusion surrounding whether the demand was $1.00 per hour, $1.60 per hour, or $1.95 per hour. (Tr. 673:17-2; Er. Ex. 3 at 57-61). After starting at zero, which Union counsel Nathan Kilbert acknowledged was a lawful opener, Respondent countered at $.03. (Er. Ex. 3 at 60; Tr. 451:25; 452:1-4).

Despite that the parties had commenced negotiations with respect to the wage increase, the Union filed an unfair labor practice three days later, on August 15, 2016, alleging that Respondent failed and refused to bargain over the annual wage increase. In fact, over the next several months, the parties exchanged eight proposals and counterproposals. (Er. Ex. 63). Grimaldi had also informed the Union on August 12 that the increase would be retroactive to August 1. (Tr. 673:21-25; 674:1-4). If anyone failed or refused to negotiate the issue, it was the Union: Respondent was compelled to file its own unfair labor practice charge against the Union on September 30, 2016 because the Union failed to provide a counter to Respondent's proposal.[5] (Tr. 480:2-9; 507:13-16). Once the Union finally provided a counter, Respondent withdrew the charge. (Tr. 480:10-21; 507:17-19).

[5] Case No. 04-CB-185333.

Nathan Kilbert made his first appearance on behalf of the Union at negotiations on August 26, 2016. (Tr. 143:25; 144:1-7). Thereafter, he attended five additional sessions (September 1, September 12, October 26, October 27, and November 17) serving as lead negotiator at those sessions, while Pozza continued to serve as lead negotiator on September 22, October 11, October 12, November 5, and November 10. (Er. Ex. 3 at 87, 94, 104, 144, 151).

Between August 26 and the last session on November 17, 2015, the parties reached seven additional tentative agreements on the following subjects, for a total of ten tentative agreements: Grievance Procedure, Federal and State Laws, Pay Day, Employee Assistance Program, Military Leave, Flu Shots, and Purpose and Intent. (Er. Exs. 40-46). Additionally, the parties spent considerable time negotiating a variety of other subjects and exchanging multiple proposals on them: Recognition (3 proposals by Employer; 2 proposals by Union), Arbitration (7 proposals by employer; 5 proposals by Union), Interim Wage Increase (4 proposals by Employer; 2 proposals by Union), Vacation (numerous verbal proposals), Seniority (9 proposals by Employer, 6 proposals by Union), Job Posting and Bids (4 proposals by Employer, 4 proposals by Union), Layoff and Severance Policy (1 proposal by Employer; 1 proposal by Union) and Plant Regulations & Discipline (4 proposals by Employer, 3 proposals by Union). (Er. Exs. 47, 48, 50, 54, 56, 65, 66).

Throughout this period, both parties provided updates to the bargaining unit through bargaining briefs. (GC Ex. 6; Er. Exs. 57-60). In the Union's briefs, it boasted that its request for more frequent meetings was paying off, as was its request for counter proposals on numerous topics. (GC Ex. 6). The Union took credit for progress being made on multiple issues, including tentative agreements. (GC Ex. 6). Importantly, the Union admitted, **"We have finally received the Company's responses to our September 2015 proposals and made real progress in some areas."** (GC Ex. 6).

4. *Respondent Responded to the Union's Information Requests*

On August 12, August 31, and September 6, 2016, the Union requested further information from Respondent, including information which had been previously provided. (Er. Exs. 6, 7, 18). Respondent responded to the Union's information requests, provided responsive information and documents to all but the Union's requests relating Respondent's competitive information, including sales information, to which the Union is not entitled.[6] (Er. Exs. 9-17, 19-23, 26).

5. *The Parties Continued Negotiating – Meeting Five Times in Three Weeks*

The parties met five times between October 26 and November 17, including back-to-back days consisting of one twelve-hour session on October 26 followed by another seven-hour session on October 27. (Er. Ex. 3 at 109-171). The parties also met on a Saturday, November 5, 2016, at which session only two members of the Union's bargaining committee showed up. (Er. Ex. 3 at 144). During these sessions, the parties reached tentative agreements on Pay Day, Employee Assistance Program and Military Leave. (Er. Ex. 42-44). When they concluded the last session on November 17, 2016, the parties were scheduled to meet on December 1, 2016 and January 3 and 19, 2017. (Er. Ex. 3 at 170).

6. *The Employees' Petition Demanding Withdrawal of Recognition*

In the meantime, unbeknownst to the parties, the employees had circulated a petition demanding that Respondent withdraw recognition of the Union. (Tr. 170:11-13). Bill Berlew, a maintenance department employee on first shift, contacted the National Right To Work Foundation and obtained information regarding how to download a petition and lawfully obtain signatures from his co-workers. (Tr. 166:1-4; 172:1-14; 173:5-9). Berlew and other employees provided detailed testimony regarding how the signatures were obtained. Berlew obtained seven signatures

[6] The Regional Director dismissed the Union's ULP on this claim. The Union appealed, and the Board left it to the ALJ to determine whether this request was appropriate.

and personally watched each of the seven individuals sign the petition. (Tr. 175:11-15). The individuals signed the petition in the locker room without any supervisors or management employees present. (Tr. 175:19-24). Each individual was presented with the entire document, including the first page with the header explaining what the document was. (Tr. 176:3-6).

Similarly, Michael Shovlin testified that he obtained ten signatures for the petition, all of whom were presented with the entire document. (Tr. 805:12-21). Shovlin provided the petition to his coworkers at his truck in the parking lot near the lot's lighting. (Tr. 807:5-14). Shovlin watched each employee review the entire petition and sign it, using either the window or the hood as a hard surface to sign. (Tr. 808:19-23; 809:5-10). No one signed inside the truck. (Tr. 809:2-6). Shovlin also witnessed one employee sign the petition in a Dunkin Donuts parking lot. (Tr. 812:5-6). The employees knew what the petition was and that it went against Union membership. (Tr. 810:6-10).

Berlew, Shovlin, and others testified that when they collected the petition, the first page of the petition was always present and that every employee read the petition and knew they were signing an anti-union petition. (Tr. 176:3-10; 782-83:25-23, 805-06, 818-20).

Upon obtaining a majority of 23 signatures of the 43-person bargaining unit, Berlew's attorney sent a letter to Grimaldi informing Respondent of the petition and demanding that Respondent cease negotiations and withdraw recognition of the Union. (Er. Exs. 2, 36, 67). Brink testified that he reviewed the petition, recognized the signatures through weekly meetings called toolbox talks where employees must sign an attendance sheet that Brink would review, and subsequently confirmed those signatures by comparing them to those on file. (Tr. 523:3-9; 524:3-16; 525:15-17). Based on the petition, the one-margin vote in the election, and the fact that there had been turnover and shrinkage to the bargaining unit, Respondent ceded to the employees' demand and withdrew recognition of the Union. (Tr. 698:12-24).

7. *Status of Unfair Labor Practice Charges*

The Union filed a number of ULPs during the latter course of negotiations: Charge No. 179357 on July 1, 2016 (dismissed in its entirety on September 26, 2016); Charge No. 182126 on August 15, 2016; Charge No. 186281 on October 17, 2016 and Charge No. 187657 on November 14, 2016 (withdrawn on January 31, 2017). Subsequent to the withdrawal of recognition, on November 30, 2016, the Union filed Charge No. 188990.

The only charges that contained allegations that remained before the ALJ were Charge Nos. 182126, 186281 and 188990. There were other claims that were dismissed or withdrawn with approval by the Regional Director, which were *not* before the ALJ. The following claims, originally included in Charge No. 188990, were not re-alleged in any new charge or amendment to the remaining charges.

On March 1, 2017, the Regional Director dismissed the Union's allegation that Respondent engaged in bad faith bargaining, finding that:

> The Union contended during the investigation that the Employer's bad faith was evidenced by its cancellation of eight bargaining sessions, obstruction in scheduling bargaining sessions, excessive caucuses, and "unreasonable" and/or regressive bargaining proposals with respect to the Union Security, Plant Rules, Job Posting and Bidding and Management Rights, Layoffs, and Seniority provisions. The investigation disclosed that throughout bargaining the Employer adhered to the parties' bargaining ground rules by scheduling bargaining sessions in advance and providing at least 24-hours' notice of any cancellations. Moreover, five of the eight bargaining cancelled sessions were rescheduled within a week of the originally scheduled date. While the Union asserted that the Employer was aware of the Union's Lead Negotiator Joe Pozza's busy schedule and asserted that every cancelled session ran the risk of becoming a lost session, it is well settled that a party acts at its peril when it chooses as a bargaining agent someone who is encumbered by other conflicts which limit his availability.

(*See* March 1, 2017 Decision to Partially Dismiss, attached hereto as Exhibit "A"). Further, the Regional Director determined that Employer's use of caucusing was not done in bad faith, and that the parties had agreed to ground rules that allowed same:

> The parties had agreed in their bargaining ground rules that "each party has the right to caucus at any time ..." and, although the ground rules also indicated that "the requesting party will inform the other party of the anticipated length of the caucus," the evidence revealed that the parties did not always adhere to this portion of the ground rules by informing each other of how long each caucus should last. Thus, though the Union felt that certain of the Employer's caucuses lasted longer than the Union felt necessary, there is insufficient evidence that the Employer was engaging in bad faith bargaining as a result of its caucuses.

Id.

The Regional Director also dismissed a claim that Respondent violated the Act by paying quarterly cash bonuses ("QCB") without notice and an opportunity to bargain, determining that Respondent's QCB is non-discretionary, is based on an established formula, and there is insufficient discretion in the formula itself to necessitate bargaining with the Union. *Id.*

II. SUMMARY OF ARGUMENT

The ALJ's rulings, findings, and conclusions invalidating the petition presented to Respondent demanding that Respondent withdrawal recognition of the Union are in error. Likewise, the ALJ's rulings, findings and conclusions with respect to Respondent's alleged refusal to bargain over economic issues and refused to provide a comprehensive response to the Union's comprehensive proposal, and that these violations would have tainted any petition, and that Respondent violated the Act when it refused to provide confidential sales and customer information requested by the Union, are factually unsupported by the record and inconsistent with Board precedent. Accordingly, the Board should reverse the ALJ's decision in its entirety. In the alternative, the Board should order that an election be held so that the employees' Section 7 rights can be honored.

III. ARGUMENT

A. The ALJ Erred in Determining That Respondent Could Not Rely on the Petition Presented to Respondent Demanding Withdrawal of Recognition of the Union (Exceptions 4-52; 70).

The ALJ erred when he determined that the petition, which had been signed by 23 of the 43 bargaining unit members, was invalid, finding that only 15 of the 23 signatures were valid. In doing so, the ALJ wrongly disregarded the will of 8 employees where the evidence and circumstances support a finding that the petition was valid. This is particularly prejudicial in light of the ALJ's ruling that he would now allow all of the petition signers to testify. (Tr. 40:4-6.)

Without any reasonable basis for doing so, the ALJ discredited the consistent and detailed testimony of every other witness (eight in all) who testified about the petition. Berlew and Shovlin provided detailed testimony regarding how the signatures were obtained. Berlew personally watched each of the individuals sign the petition. (Tr. 175:11-15). The individuals signed the petition in the locker room without any supervisors or management employees present. (Tr. 175:19-24). Each individual was presented with the entire document, including the first page with the header explaining what the document was. (Tr. 176:3-6).

Similarly, Michael Shovlin testified that for the signatures he obtained for the petition, all of whom were presented with the entire document. (Tr. 805:12-21). Shovlin provided the petition to his coworkers at his truck in the parking lot near the lot's lighting. (Tr. 807:5-14). Shovlin watched each employee review the entire petition and sign it, using either the window or the hood as a hard surface to sign. (Tr. 808:19-23; 809:5-10). Shovlin also witnessed one employee sign the petition in a Dunkin Donuts parking lot. (Tr. 812:5-6). The employees knew what the petition was and that it went against Union membership. (Tr. 810:6-10).

Berlew, Shovlin, and others testified that when they collected the petition, the first page of the petition was always present and that every employee read the petition and knew they were signing an anti-union petition. (Tr. 176:3-10; 782-83:25-23, 805-06, 818-20).

Instead of crediting this detailed and consistent testimony, as well as the testimony of five other petition signers (Josh Antosh, Russell Finch, Donald Crispell, Stan Cegelka, and Adam Mewhort, who was called by the General Counsel), the ALJ credited an employee, Steve Brotzman, who was terminated for cause and lied on the stand about it. The ALJ inexplicably disregarded that Brotzman lied when he testified about the reason for his termination (testifying that he was terminated for "quality issues"),[7] and then failed to give any weight to the uncontroverted fact that Brotzman was terminated for dishonesty – he falsified company inspection records. None of the other witnesses can be impeached in this way. There is no evidence that any other witness who testified about signing the petition similarly lied on the stand or was terminated for a "crime" of dishonesty. In fact, Brotzman himself testified that he trusted Berlew (an openly anti-Union employee) and that he believed Berlew to be trustworthy and honest. (Tr. p. 760:19-25). Consistent with the other petition-signers who were permitted to testify at the hearing, the testimony of the General Counsel's own witness, Adam Mewhort, establishes not only that he knew what he was signing, but that Berlew gave him time to consider whether he wanted to sign it. (Tr. pp. 149-150)). Brotzman's testimony is simply not credible and the Board should overturn the ALJ's determination that it was. *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) (refusal to credit prejudiced testimony that is against the weight of the evidence).[8]

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[7] In his decision, the ALJ states, "Since neither reason reflects well on Brotzman, I see no reason to discredit his testimony about what he signed."

[8] The Board does not hesitate to overturn an administrative law ALJ's credibility resolutions when they are not primarily based on demeanor. *See, e.g., Marshall Engineered Products Co., LLC*, 351 NLRB 767, 768 (2007) ("[W]e emphasize that the ALJ did not resolve the issue of credibility based primarily on demeanor."); *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn.

In an effort to bolster his erroneous conclusion that the employees' petition was not valid, the ALJ made misassumptions about whether signatures could be obtained by Berlew and Shovlin on October 19 and 20. Although the ALJ notes that Berlew worked first shift and Shovlin worked third shift (Decision p. 3, line 1), he fails to understand the significance of that. Contrary to the ALJ's conclusion, Berlew could have continued obtaining signatures on both October 19 and 20 before and after Shovlin did – Berlew having the petition during the day on October 19, Shovlin having the petition overnight from October 19-20 and returning the petition to Berlew on October 20.

Ironically, although the ALJ was happy to credit the testimony of an admitted liar in Brotzman, he discredited as "self-serving" the testimony of another unimpeached witness – Tim Brink – who testified credibly regarding his familiarity with the signatures on the petition.[9] Brink testified that he was intimately familiar with the signatures on the petition. Brink facilitated weekly "toolbox talks" – meetings that every shift attended, and each employee signed and printed their names on an attendance sheet. (Tr. 524:3-16). When Brink conducted the meetings, he personally collected the sign-in sheets and reviewed them at that time. (Tr. 525:2-6). Even after Brink stopped facilitating the meetings himself, all sign-in sheets with signatures came across his desk for review. (Tr. 533:20-25; 1-7). Therefore, upon receipt of the petition in November 2016, Brink recognized the signatures. (Tr. 526:4-7).

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6 (1979) ("[W]e view the [ALJ's] credibility resolutions . . . as unsupported by the record and based more on his analysis of the circumstances than on the demeanor of the witnesses."); *International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 38 (Cleveland Electro Metals Co.)*, 221 NLRB 1073, 1074 fn. 5 ("[W]here credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.").

[9] The ALJ credited Brink's testimony regarding Brotzman's termination of employment.

Contrary to this testimony, the ALJ misconstrues Brink's testimony: "[Brink] contends that he was able to verify the signature of every employee on the petition as a result of seeing them on toolbox sign-in sheets two years before the petition." In fact, Brink testified that he reviewed the weekly tool-box sign-in sheets throughout the relevant time period, up to the time he received the petition. The ALJ further erroneously states "there is … no evidence that every employee whose name appears on the petition was employed at Tru-Form at the time Brink reviewed these sheets" and makes the unsubstantiated determination that Brink "would have no way of knowing whether or not the signatures of these employees were authentic." In fact, Respondent provided a list containing this information to the General Counsel in response to its subpoena, further supported by testimony. (GC Ex. 7. *See also,* Tr. 166:12-13; 775:20-24; 784:7-10).

The ALJ further erroneously ignores Brinks' testimony that he later confirmed the signatures by comparing them to those on file. (Tr. 525:15-17). Verifying the authenticity of a disaffection petition after the withdrawal is indeed sufficient evidence of its authenticity. *Flying Foods Grp.*, 345 NLRB at n. 9 (noting that the Board has rejected the argument that withdrawal of recognition is unlawful when the employer fails to verify the authenticity of a disaffection petition *before* withdrawing recognition) (emphasis added). Brink's testimony alone is, therefore, sufficient to confirm the validity of the petition.

Furthermore, the ALJ made it clear that he would not permit Respondent to call each and every petition signer as a witness at the hearing. (Tr. 40:4-6). Now, however, the ALJ uses that against Respondent, calling into question the validity of the signatures of certain individuals. (Decision p. 7, footnote 11.) Had the ALJ permitted, Respondent could have called all 23 petition-signers to verify their signatures, eliminating any question.

Finally, the context within which the petition was received bolsters Respondent's good-faith basis for withdrawal and was wrongly dismissed by the ALJ. While Respondent obviously based its withdrawal on the petition itself – after all, it is a document which clearly states that the employees demand Respondent withdraw recognition of the Union, it cannot be ignored that Respondent was well aware when it received the petition that the Union had only prevailed by one vote,[10] that the unit was always divided, that the third-shift employees had a longstanding dislike for the Union (*see* Tr. 102:3-11, 166-67, 783) and that there had been turnover in the unit (789:20-23). This context goes directly to Respondent's good faith in relying on the petition.

The only testimony that supports the ALJ's finding that signatories to the petition signed blank pages or did not know what they were signing is the testimony of Brotzman, who lied under oath and was terminated for falsifying company documents. All of the other testimony is consistent that each signer was presented with the entire petition, including the language on page 1, and that they understood that they were signing a petition demanding withdrawal of recognition. That, combined with Brink's unimpeached testimony and the uncontroverted facts that the Union won by one vote, the unit was long divided and there had been turnover in the unit, satisfies Respondent's burden in establishing that it relied in good faith on the employees' petition when it withdrew recognition of the Union.

B. Respondent Did Not Refuse To Bargain over Economic Issues (Exceptions 2, 53-56; 65).

The ALJ summarily—and incorrectly—concluded that Respondent "refused indefinitely" to bargain over economic matters until non-economic matters were resolved. This conclusion is not supported by fact or law.

[10] The ALJ states that the Union prevailed by only "2 votes" but had a single additional voter voted against the Union, the result would have been a tie, and the Union would not have been certified.

1. *The Facts Do Not Support this Conclusion.*

At the parties' first negotiating session, ground rules were negotiated and agreed upon. (Tr. 620:11-18; 621:5-9). Those ground rules included language proposals would be discussed prior to the discussion of economic proposals, a common approach in first contract situations such as this one. (GC Ex. 8; Tr. 621:21-25; 622:1-7). However, contrary to the ALJ's assertion, Respondent never refused to bargain over any topic. (Tr. 622:23-25; 623:1-8; 624:13-17). In fact, Kilbert testified, "I don't think the Employer ever said [it would never negotiate] with respect to any proposal that the Union had advanced." (Tr. 466:11-21).

Moreover, Respondent did indeed bargain over economic issues as necessary. In fact, before negotiations formally started, Respondent asked the Union for a meeting to discuss healthcare in light of the June 2015 renewal deadline. (Tr. 49-50, 341). The Union agreed and the parties met. (Tr. 49; 341; 704).

Similarly, the parties negotiated the annual wage increase at length. Between August and November 2016, the parties exchanged ten proposals and counterproposals on the topic. (Er. Exs. 3, 63). On August 26, 2016 and thereafter, Respondent provided three proposals on the amount of the wage increase with no response from the Union until October 26, 2016. (Er. Exs. 3, 63). In fact, Respondent filed a ULP against the Union based on its refusal to bargain. (Tr. 480:2-9; 507:13-16).

Similarly, the parties negotiated healthcare premiums at length between April and July 2016, and only stopped because of the Union's refusal to continue. (Er. Ex. 53). In April 2016, Respondent notified the Union that the Company's medical insurance carrier was raising rates effective June 1, 2016, and, therefore, Respondent wished to negotiate health insurance prior to the completion of negotiation over language. (Er. Ex. 3 at 36; Tr. 542:15-25; 543:1-8). Given the

time sensitive nature of the issue, Grimaldi offered multiple ways of meeting before the end of May to wrap up healthcare, such as by phone or exchanging proposals in between sessions, but Pozza again refused Respondent's suggestions. (Er. Ex. 3 at 44, 46). Grimaldi also offered to have a meeting at 7:00 a.m. sometime before the end of May, but Pozza responded that he "[couldn't] guarantee anything." (Er. Ex. 3 at 47). Pozza did not provide any proposals in the interim, nor did he agree to a 7:00 a.m. meeting. (Tr. 673:1-14). The parties failed to reach agreement prior to June 1, and Respondent maintained status quo – the percentage contributions by Respondent and employee remained the same. (Tr. 546:2-15).

During the next two sessions, on June 13 and July 12, Respondent continued to attempt to negotiate health care, but met a wall in Pozza who insisted that the Union "accepted what was implemented" and refused to engage in further bargaining over the subject. (Er. Ex. 3 at 48-56; Tr. 546:9-10). However, Respondent had not implemented any changes; rather, the percentage contribution remained the same. (Tr. 546:2-15). Respondent's goal was to increase the percentage, but the Union refused to negotiate. (Tr. 542:15-23). Kilbert never provided a counter proposal upon joining the Union's bargaining committee. (Er. Ex. 53). The ball was in the Union's court. This claim is disingenuous, again as evidenced by the Regional Director's dismissal of the Union's claim regarding unilateral changes to healthcare premiums:

> "The Employer…informed the Union that those changes were subject to continued bargaining with the Union and could change depending on the outcome of bargaining. On June 13, 2016, the Employer offered to continue bargaining with the Union over healthcare premiums. It is undisputed that the Union chose not to bargain further on this issue and indicated on June 13 and times thereafter that it accepted the Employer's health insurance premium increase."

(*See* March 1, 2017 Decision to Partially Dismiss). Therefore, the General Counsel's allegation—and the ALJ's agreement with same—that Respondent failed to bargain over healthcare is not made in good faith.

Additional examples of economic topics discussed are New Classification and/or Rates, Reporting Pay and Call-in Pay,[11] Hourly Classification and Pay Structure,[12] Bereavement and Jury Duty Leave and Layoff & Severance Policy. (Er. Exs. 37, 38, 52, 63, 66). Thus, the ALJ's determination that Respondent "refused indefinitely to bargain over economic matters" is factually incorrect.

The ALJ is correct that on October 17, 2016, the Union sent a letter to Respondent requesting that it discuss the Union's economic proposals at the upcoming sessions. The ALJ fails to note, however, that Respondent did in fact discuss economic proposals following the Union's request and met with the Union five times in three weeks shortly thereafter. This included back-to-back days consisting of one twelve-hour session on October 26 followed by another seven-hour session on October 27. (Er. Ex. 3 at 109-171). The parties also met on a Saturday, November 5, 2016, at which session only two members of the Union's bargaining committee showed up. (Er. Ex. 3 at 144).

Specifically, the parties engaged in a lengthy discussion regarding vacation and exchanged verbal proposals on the topic during the next two sessions on October 26 and 27. (Er. Ex. 63) (Tr. 648:20-25; 649:1-7). Additionally, Respondent continued to negotiate the annual wage increase and provided another counter on November 5; provided a proposal on New Classification and Rates on November 10; and provided a counter to the Union's Layoff and Severance Policy on November 17. (Er. Exs. 3, 63, 66). The record illustrates that Respondent acted in accordance with the Union's October 17th request and began countering its economic proposals. The ALJ's conclusion to the contrary is plainly in error.

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[11] This was included in the Employer's Time and Attendance proposals. (Tr. 667:9-11)(Er. Ex. 52).

[12] This was included in the Employer's proposals regarding New Classifications and/or Rates. (Tr. 733:1-5).

2. *Board Precedent Does Not Support the ALJ's Finding.*

Board law also weighs against the ALJ's finding. The ALJ's reliance on *John Wanamaker Philadelphia*[13] is misguided. In that case, the parties disagreed as to the meaning of the ground rules, which is not the case here. In that case, the employer took the position that all non-economic items must be *settled* before moving to economic discussions, while the union understood the ground rules to mean the parties would *attempt* to settle noneconomic matters first. 279 NLRB at 1035. The ALJ credited the Union's interpretation as being correct. *Id.* Therefore, he found that Respondent's absolute refusal to discuss economic issues for six months was contrary to the agreed-upon ground rules—*not* that ground rules requiring non-economic topics to be resolved first are unlawful. *Id.* Nor did the Board find that such a ground rule would fragment negotiations. *Id.* Rather, the Board affirmed that the employer's tactic of *not* adhering to the ground rules and instead refusing to discuss economic topics until the union agreed to no-strike and binding arbitration provisions was unlawful. *Id.* In other words, the Board found that the employer's unabashed refusal to discuss any economic issues until the union agreed to two particular provisions was in violation of the parties' ground rules and that the attempt to leverage the strike and arbitration provisions was contrary to the meaning of the Act. No such tactic is at play here.

In this case, Respondent did not engage in such strong-arming, nor did it interpret the ground rules differently than the Union. Tellingly, no party is asserting that it did. Rather, the Union and General Counsel simply allege without any applicable legal basis that Respondent should not have been able to rely on the ground rules. *John Wanamaker Philadelphia* is wholly distinguishable and inapplicable to this case.

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[13] 279 NLRB 140 (1986).

Similarly, the ALJ's reliance on *Detroit Newspapers*[14] is flawed. In that case, the Board noted that "insisting indefinitely" on the resolution of all non-economic issues before negotiating economic issues can be a violation of the law. 326 NLRB at 704. However, the Board specifically noted that ground rules allowing for two-stage bargaining, non-economic then economic, is indeed ***permissible***. *Id.* (emphasis added). In that case, the parties had agreed to such a two-stage bargaining process, but the employer then tried to negotiate economic issues before all non-economic issues were resolved. *Id.* The Board found that the employer's deviation from the parties' agreement was not unlawful because it was done in a good faith attempt to accelerate the bargaining process. *Id.* Significantly, the very footnote cited by the ALJ states that parties should have the flexibility "*to enter into* and deviate from" new bargaining formats without the risk of being found to have violated their obligation to bargain in good faith. *Id.* at n. 11 (emphasis added).

The ALJ's suggestion here that Respondent's abidance of the ground rules generally is somehow unlawful is not supported by this, or any, case. On the contrary, *Detroit News* <u>*supports*</u> the use of ground rules requiring two-stage bargaining, and deviation from same as necessary. This is the very same approach Respondent used in the case at bar. While it did its best to abide by the agreed-upon ground rules, it certainly was flexible and negotiated certain economic issues as necessary to facilitate bargaining, such as healthcare and the annual wage increase. This conduct is not unlawful, as evidenced by the very case relied upon by the ALJ. Moreover, unlike *Detroit Newspapers* wherein the union refused to negotiate economic issues following the employer's request to deviate from the ground rules, Respondent here did in fact respond to the Union's request to deviate from the ground rules on October 17, 2016 and provided proposals on New

[14] 326 NLRB 700 (1998).

Classification and Rates, Layoff and Severance, Vacation, Reporting Pay and Call-in Pay, and Hourly Classification and Pay Structure. (Er. Exs. 3, 52, 63, 66) (Tr. 667:9-11; 733:1-5).

The ALJ's reliance on *Adrian Daily Telegram*[15] is similarly baseless. In that case, the Board affirmed the ALJ's finding of bad faith bargaining—a claim not at issue here and previously dismissed by the Regional Director—because the employer altogether refused to bargain until the Union changed its position on specific non-economic provisions. 214 NLRB at 1112. This finding is void of any reference to ground rules and was based on a myriad of behavior on the part of the employer, not just its request that non-economic issues be discussed first. *Id.* *Adrian Daily Telegram* is not only distinguishable, but irrelevant to the case at hand.

The record is clear that Respondent did not refuse indefinitely to bargain over economic matters and did in fact do so as necessary. The ALJ's application of the legal precedent above is incorrect and the finding should be reversed.

C. Respondent Did Not Refuse to Provide a Response to the Union's September 15, 2015 Bargaining Proposal (Exceptions 57-62; 66-68).

The ALJ erroneously concludes that Respondent violated the Act by not responding to each and every provision included in the Union's original September 15, 2015 proposal. This conclusion is similarly not supported by law or fact. In cases such as this, it is improper to assess each provision as a stand-alone; rather in determining whether there has been an unfair labor practice, the Board must take into account the state of mind of the employer by investigating the totality of the circumstances. *NLRB v. Cascade Emp'rs Ass'n*, 296 F.2d 42 (9th Cir. 1961) (holding that Board had erroneously applied per se rule rather than looking to "totality of circumstances" surrounding bargaining).

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[15] 214 NLRB 1103 (1974)

1. *The ALJ's Determination is Not Supported by the Totality of the Circumstances.*

At the parties' first bargaining session on September 17, 2015, the Union provided Respondent with a comprehensive proposal, which was essentially a duplicate of the Union's collective bargaining agreement from another plant – Mountain Top – combined with a few policies from Tru Form's handbook. (Tr. 86:21-24; 88:9-11). Respondent expressed on numerous occasions that it was not interested in duplicating the Mountain Top contract for various reasons, including that they were two different plants with different structure, different operations and different needs, and that there were problems with the Mountain Top contract. (Tr. 623:22-25; 624:2-12).

At the second bargaining session on October 15, 2015, the parties reviewed the Union's proposal, *provision by provision*, with Respondent providing the Union its position on each proposal. (Tr. 622:23-25; 623:1-8; 624:13-20). Respondent never indicated at this session, or at any other, that it would not bargain over any of the provisions in the Union's proposal. (Tr. 626:5-7). Indeed, Union counsel Nate Kilbert testified, "I don't think the Employer ever said [it would never negotiate] with respect to any proposal that the Union had advanced." (Tr. 466:18-21) (See also Tr. 466:11-13).

The ALJ found that prior to August 26, 2016, Respondent had provided seven counter proposals to the specific proposals included in the Union's original proposal: Dues Check Off, Union Shop, Management Rights, Strikes and Lockouts, Bereavement, Jury Duty and Shoe Allowances. The ALJ ignores Respondent's proposals on Time and Attendance, the first of which was offered on March 14, 2016, which covered the topics of Call-in Pay and Reporting Pay. (Er. Exs. 52, 63) (Tr. 646:13-24; 647:17-25; 648:1-5). Because proposals go back and forth during negotiations, one party may refer to them as a different title than the other, or one party may

propose separate proposals while the other combines some topics into one proposal, as Respondent did here. (Tr. 646:13-24). Because how employees call in or report out is intertwined with absenteeism, Respondent included all of this as part of Time and Attendance. (Tr. 646:13-24; 647:17-25; 648:1-5) (Er. Ex. 63). Similarly, Timekeeping was also negotiated as part of Time and Attendance, another fact ignored by the ALJ. (Tr. 667:9-11). Likewise, Respondent began responding to the Union's proposal on Safety and Health in November 2015 with its proposal on Plant Regulations and Discipline, which included safety and health issues, and the parties exchanged multiple proposals on this topic. (Tr. 669:15-25; Er. Ex. 56, 63). Further, discipline of certain regulations were addressed in this proposal. (Tr. 669:15-25). The ALJ also ignored Respondent's proposals on insurance benefits, which began on May 16, 2016. (Er. Exs. 3, 53, 63). Therefore, prior to August 26, Respondent had responded to at least twelve of the specific proposals, not seven. During this timeframe, the parties reached tentative agreements on three provisions (Bereavement Leave, Jury Duty, and Non-discrimination). (Er. Ex. 37-39).

Between August 25, 2016 and the last bargaining session on November 17, 2016, besides continuing negotiation on some of the above-referenced provisions, Respondent responded to thirteen proposals contained in the Union's original proposal. (Er. Exs. 40-45, 47, 50, 54, 63, 65, 66). These included Recognition, Grievances, Arbitration, Vacation, Seniority, Job Posting, Federal and State Laws, New Classification and/or Rates[16], Layoff and Severance Policy, Payday, EAP, Military Leave and Flu Shots. (Er. Exs. 40-45, 47, 50, 54, 63, 65, 66). Additionally, Respondent included Personal Protective Equipment (or "PPE") in New Classification and/or Rates proposal. (GC Ex. 41; Tr. 730:8-18). As Grimaldi explained, Respondent "discussed hazards, PPE requirements, noise level, atmospheric conditions, and so forth" in this proposal. (Tr.

[16] It is undisputed that the Employer provided verbal proposals on Vacation and New Classification and Rates. (Er. Ex. 63; Er. Ex. 3 at 16) (Tr. 648:20-25; 649:1-7; 733:1-5).

730:8-18). Shoes were also included. (Tr. 730:18). Similarly, although COBRA was not separately negotiated, the parties came to an agreement on Federal and State Laws, which would cover COBRA compliance as it is a Federal law. (Tr. 667:19-25). Likewise, Hourly Classification and Pay Structure was discussed with New Classifications and/or Rates and the creation of a lead provision, and information regarding rates was provided. (Tr. 733:1-5).

The parties were also making significant progress with tentative agreements during this timeframe, more than doubling the number reached in the last year: Grievance Procedure, Federal and State Laws, Pay Day, Employee Assistance Program, Military Leave, Flu Shots, and Purpose and Intent. (Er. Exs. 40-46).

The Union acknowledged the progress with regard to its original proposal, stating in an October bargaining brief that, **"We have finally received the Company's responses to our September 2015 proposals and made real progress in some areas."** (GC Ex. 6).

Curiously, the ALJ makes no reference to any of Respondent's proposals after August 26 or the tentative agreements. These proposals further illustrate Respondent's good faith attempt to move negotiations forward—it was able to respond to thirteen proposals in three months working with Kilbert, while it was only able to respond to eleven proposals in eleven months working with Pozza. The ALJ's blatant disregard for these facts was a significant error.

Moreover, with respect to several provisions, it was Respondent who had provided the last counter: Recognition, Dues Checkoff, Union Security, Strikes and Lockouts, Time and Attendance, Insurance Benefits, Interim Wage Increase, Job Posting, New Classification and/or Rates, and Pay Day. (Er. Ex. 47, 48, 49, 51, 51A, 52, 53, 54, 63) (GC Ex. 32) (Tr. 642:14-25; 643:1-3).

With regard to some of the articles, the parties simply did not get to them prior to the withdrawal of recognition. Other than the Union's initial proposal, neither party discussed, or attempted to discuss, Holidays, 401k Savings Plans, Rights and Assigns, Flexible Spending Accounts, Education Refund Policy. (Tr. 649:9-17; 661:7-13; 669:1-3). Similarly, the Termination Date and Reopening clause was not negotiated, as that is usually one of the very last items negotiated. (Tr. 665:18-25). Although the Union argues it provided a proposal with its initial "comprehensive" proposal, that document included contradictory language as to the term of the contract, rendering the provision meaningless. (Tr. 666:8-17).

The ALJ's conclusion is wholly unsupported by the facts. The ALJ contorts the law to suggest that if Respondent failed to provide a proposal to one or more of the Union's proposals, it does so in bad faith in violation of the Act. This is in direct contravention of Kilbert's admission on cross-examination that "the Act does not compel any party to make a proposal or counterproposal." (Tr. 428:9-11). When looking at the totality of the circumstances, it is clear Respondent was certainly negotiating and, as admitted by Kilbert, never refused to bargain over a specific topic. Negotiations were clearly progressing after August 26, as evidenced by the significantly higher rate of proposals in a much shorter timeframe, double the number of tentative agreements and the Union's admission that negotiations were progressing. There was no refusal to bargain.

2. *Respondent's Alleged Failure was not Unlawful.*

Regardless, Respondent's failure to provide a written counter to each and every proposal as presented by the Union is not unlawful. The parties "need not contract on any specific terms." *The Adrian Daily Telegram*, 214 NLRB 1103, 1112 (1974) (citing *N.L.R.B. v. Insurance Agents' Union*, 361 U.S. 477, 485, 486 (1960)). Nor is an employer required to include every provision

the Union proposes in the contract. *NLRB v. Arkansas Rice Growers Co-Op Assn.*, 400 F. 2d 565, 568 (8th Cir. 1968) (holding that failure to make a counter-proposal, in and of itself, does not constitute an unfair labor practice); *J&C Towing Co.*, 307 NLRB 198 (1992) ("No party can be required to agree to any particular substantive bargaining provision.").

The Union's original proposal was simply unworkable. As previously noted, it was essentially a duplicate of the Union's collective bargaining agreement from Mountain Top, combined with a few policies from Tru Form's handbook. (Tr. 86:21-24; 88:9-11). Respondent repeatedly explained that it was not interested in a Mountain Top contract for various reasons. (Tr. 623:22-25; 624:2-12). Further, the proposal was sloppy at best, as evidence by the contradictory language as to the term of the contract.

The ALJ's determination is again flawed by citations to inapplicable—and vacated—legal precedent. Throughout this matter, Respondent reminded the parties that the Regional Director had previously dismissed the allegation of overall bad faith bargaining. Seemingly in response to this reminder, the ALJ noted in his decision that the fact of such a dismissal "does not preclude a finding that Respondent violated the Act in failing to make a comprehensive counter proposal or refusing to negotiate about economic matters. In support of this, the ALJ cites *Whisper Soft Mills, Inc.*[17] In *Whisper Soft Mills,* there was no comprehensive contract proposal made, nor had there been a prior dismissal of bad-faith bargaining claim. 267 NLRB at 822. Moreover, in that case, the employer had provided misleading information related to wage increases, which was the basis for the finding of the failure to bargain charge. *Id.* Most notably, however, that case was vacated and no longer carries precedential value. *Whisper Soft Mills, Inc.* v. N.L.R.B., 754 F.2d 1381, 1387

[17] 267 NLRB 813, 822 (1983).

(9th Cir. 1984). A factually deficient finding based on vacated legal precedent simply cannot be upheld.

D. Even If Required to Do So, Failing to Respond to All Economic Proposals or to Each Provision of the Union's Comprehensive Proposal Did Not Taint the Withdrawal (Exceptions 1, 3, 63, 64, 69. 71).

Nonetheless, even assuming *arguendo* that Respondent's conduct was unlawful with regard to either allegation related to failure to bargain, it certainly did not taint the withdrawal of recognition. In terms of timing, the General Counsel alleges that, beginning three months prior to the withdrawal of recognition, the Employer failed to provide proposals on nineteen subjects. However, as previously noted, during this timeframe, the parties came to seven tentative agreements, more than twice as many as it had over the previous year. Those seven included Grievance Procedure, Federal and State Laws, Pay Day, Employee Assistance Program, Military Leave, Flu Shots, and Purpose and Intent. (Er. Exs. 40-46). These are provisions Kilbert himself considered "important to the bargaining unit" or mandatory subjects of bargaining. (Tr. 425:2-25).

Additionally, the parties spent considerable time negotiating a variety of other subjects and exchanging multiple proposals on them: Recognition (3 proposals by Employer; 2 proposals by Union), Arbitration (7 proposals by employer; 5 proposals by Union), Interim Wage Increase (4 proposals by Employer; 2 proposals by Union), Vacation (numerous verbal proposals), Seniority (9 proposals by Employer, 6 proposals by Union), Job Posting and Bids (4 proposals by Employer, 4 proposals by Union), Layoff and Severance Policy (1 proposal by Employer; 1 proposal by Union) and Plant Regulations & Discipline (4 proposals by Employer, 3 proposals by Union). (Er. Exs. 47, 48, 50, 54, 56, 65, 66).

Therefore, to the extent the other topics were ignored, their timing weighs against a finding of taint because, in the interim, numerous other provisions were negotiated, many of which ended

in tentative agreements. Additionally, as discussed above, the Employer did in fact begin countering economic proposals after the Union requested it.

There is little to no possibility of detrimental or lasting effects on employees. Again, the parties *were* negotiating and, compared to the prior year, were making much progress. This included negotiation of economic issues. Rather than having a detrimental effect, the parties were getting closer to a contract every session. Therefore, this weighs against taint.

Similarly, this failure to respond to each and every proposal or respond to all economic proposals could not have caused disaffection with the Union, as the Union was reaching more tentative agreements with the Employer than it ever had in the past year. This is motivating, not dissatisfying. The momentum of the negotiations in the last three months speaks for itself. These nineteen provisions alleged by the General Counsel—many of which *were* negotiated—cannot be viewed in a vacuum. Even if they were not negotiated, which the Employer disputes, 20 other provisions *were* negotiated. As the Regional Director noted in his dismissal of the Union's bad faith bargaining claim, the Employer "engaged in hard, not regressive bargaining and did not engage in unlawful bad faith bargaining in violation of Section 8(a)(5) of the Act." This rings true in this context as well. There is little likelihood of disaffection based on the General Counsel's allegations, which weight against a finding of taint.

Lastly, the Employer's conduct would not reasonably affect employee morale, organizational activities, or membership in the Union. Though negotiations may have been slow, they were gaining momentum and the number of tentative agreements had more than doubled. This included a tentative agreement on Grievance Procedure, which Kilbert said was one of the "essentials in any contract." (Tr. 488:6-14). The parties were making progress and negotiating—and agreeing upon—many mandatory subjects of bargaining. Mr. Grimaldi attributed the change

in productivity to Kilbert. (Tr. 627:8-22). Specifically, Pozza was maddening, disorganized, unfocused, and unresponsive.[18] (Tr. 627:8-22). After Kilbert took over, at least during six of the negotiating sessions, the parties were able to achieve more than they had in the last year. This undermines any claims of taint between August and November related to bargaining, as established by the record of this case.

Again, there is no "time limit" on reaching a CBA if the parties are negotiating in good faith. *See, e.g., St. George Warehouse, Inc.*, 349 NLRB 870 (2007) (Board found no bad faith where there had been bargaining for two years with concessions being made). The judge was wrong to base his conclusion in part on "negotiations between the Union and Respondent had dragged on for another 6 months." (Decision p. 3, line 9.) Especially, where the Regional Director has dismissed the allegation of bad faith bargaining, a decision upheld on appeal. (*See* June 29, 2017 denial of appeal, attached as Exhibit "B").

In fact, the Union touted the gaining of momentum in its bargaining briefs, stating in September that its requests for more frequent and longer meetings were "finally paying off." (GC Ex. 6). Similarly, in October, the Union stated that, "we have made progress towards agreements" on seniority and arbitration and that it was "pleased to announce" a tentative agreement on arbitration. *Id.* Notably, in its Progress Report June-October 2016, the Union noted the increase in frequency of meetings and boasted that, **"We have finally received the Company's responses to our September 2015 proposals and made real progress in some areas."** *Id.* Indeed, the Union itself admitted it was receiving responses and was making progress. The Union's own admission

[18] It is perhaps telling that the General Counsel did not call Mr. Pozza as a witness. He was at the majority of the bargaining sessions and could have provided testimony on behalf of the Union.

flies in the face of the ALJ's conclusory statement that "the continued lack of progress in negotiations" was likely to cause dissatisfaction with the Union.

Tellingly, despite citing the four *Master Slack* factors, the ALJ did not apply them in his decision. Rather, he made another conclusory determination without factual or legal support. Accordingly, his finding related to failure to bargain over economic issues and failure to respond to the Union's September 2015 comprehensive proposal, and their alleged taint of the withdrawal, must be reversed.

E. The ALJ Erred in Finding That Respondent Had an Obligation To Provide Sales, Pricing or Other Competitive Information (Exceptions 73-80).

Although he finds that the failure to provide information would not taint a petition, the ALJ erroneously concludes that Respondent violated the Act by not providing sales figures and pricing and other competitive information to the Union. With respect to sales information, the ALJ states, without establishing that the Union is entitled to such information – or even that the Union requested it – that Respondent "waived its claim of confidentiality" by refusing to negotiate a confidentiality agreement with regard to sales figures, a factor, according to the ALJ, by which Quarterly Cash Bonuses were determined. The ALJ ignores the fact that the Regional Director previously dismissed a claim that Respondent violated the Act by paying quarterly cash bonuses ("QCB") without notice and an opportunity to bargain. (*See* March 1, 2017 Decision to Partially Dismiss). In doing so, the Regional Director determined that Respondent's QCB is non-discretionary, is based on an established formula, and there is insufficient discretion in the formula itself to necessitate bargaining with the Union. *Id.* While the Union may have been entitled to the amount of QCB payments (which were provided by Respondent), there is no reason for the Union to obtain the underlying data used by Respondent in making its calculation. To the extent the

parties would bargain over the QCB, it would be over whether unit members would continue to participate in the program.

In fact, this finding appears to be a back door justification for why Respondent should be required to produce sales information. The only information Respondent did not provide to the Union was the information related to its competitiveness: the current prices for the five items produced by the facility that realize the greatest revenue; all changes to the prices of the items listed between January 1, 2014, and the present; the labor cost at the facility as a percentage of the price of each of the items listed in as of the current date and as of January 1 of 2016, 2015, and 2014; and the identities of the Company's primary competitors for each of the items listed in and the current prices of their most equivalent products. Contrary to the ALJ's finding, the Union was not entitled to this information.

The ALJ justifies his conclusion that Respondent should be required to produce competitive information by pointing to the Union's proposed wage increases as "in line with those the company had given for the past several years" whereas, according to the ALJ, "Respondent told the Union it would not do so in 2016 because it did not want its customers to be faced with a 15% increase in its prices." The ALJ made this statement out of whole cloth – the record is utterly devoid of Respondent making any such statement at any time.

Further, the ALJ's finding is both factually and legally in error. The Union does contend that Grimaldi allegedly referred to the Company's need to be competitive on price in justifying its position on wage increases, and it is therefore somehow entitled to the above-referenced information. However, Respondent never stated that the Company must remain competitive on price as a justification for the Company's position as to wages. (Er. Ex. 19) (Tr. 681:5-11). Rather, Respondent made a general reference to American business in general and not specifically

Respondent's customers. *Id.* There was no reference to Respondent's specific customers or competitors. *Id.* Respondent simply made clear repeatedly that it did not want to provide a substantial wage increase, not that it could not. (Tr. 679:22-25; 680:1-3; 681:21-25; 682:1). As soon as the Union requested the information, Respondent made clear it clear that its position was based on not wanting to provide such an increase, not that it could not. (Er. Ex. 19; Tr. 679:22-25; 680:1-3; 681:21-25; 682:1). Indeed, the Union explicitly noted in it September 12, 2016 bargaining brief: "The Union asked whether the Company was saying they couldn't afford it, and the Company said 'no.' The only explanation they could offer was they just do not want to pay." (GC Ex. 6) (emphasis on original). Accordingly, the ALJ's factual finding is in error.

Moreover, Respondent had no obligation to prove it could afford a substantial wage increase, nor was it required to provide competitor information.[19] The longstanding Board precedent on this issue establishes that a union is not entitled to audit an employer's financial records if the employer claims an unwillingness to pay, versus an inability to pay, in collective bargaining negotiations. *Coupled Products LLC*, 359 NLRB No. 152 (July 10, 2013). An employer's assertion of previous competitive disadvantage "does not, in and of itself, constitute a claim of inability to pay." *NLRB v. Harvstone Manufacturing Corp.*, 785 F.2d 570 (7th Cir. 1986). Moreover, employer's obligation "to provide a union with information by which it may fulfill its representative function in bargaining does not extend to information concerning the employer's projections of its future ability to compete. We consider that obligation to arise only when the employer has signified that it is at present unable to pay proposed wages and benefits. **We do not equate 'inability to compete,' whether or not linked to job loss, with a present 'inability to pay.'**" *Nielsen Lithographing Co.*, 305 NLRB 697, 701 (1991) (emphasis added); *See also Paperworkers*

[19] The Union's claim that Respondent failed to provide a wage increase was withdrawn by the Union and was not before the ALJ.

(Georgia-Pacific Corp.) v. NLRB, 981 F.2d 861, 865 (6th Cir. 1992) (employer's statements that it was not competitive and wanted to reduce its costs did not trigger duty to furnish information; "[t]he relevant test, ... is to ascertain whether the employer said it 'would not' as opposed to 'could not' pay the employees' proposed demands"); *Facet Enters. v. NLRB*, 907 F.2d 963, 134 LRRM 2609 (10th Cir.), supplemented, 300 NLRB 699 (1990); *Genstar Stone Prods. Co.*, 317 NLRB 1293 (1995) (employer statements such as "the well is dry" did not amount to claim of present inability to pay); *F.A. Bartlett Tree Expert Co.*, 316 NLRB 1312 (1995) (employer's statements that it would not remain competitive if it was forced to unilaterally increase wages did not trigger duty to furnish information).

The ALJ's conclusion – that the Union is entitled to the information because its proposed wage increases were in line with those of the past several years – is directly contradicted by law. "The Act does not require employers to be equitable in their dealings with their employees. An employer can be as greedy as it pleases." *Graphic Commc'ns Int'l Union, Local 508 O-K-I, AFL-CIO v. N.L.R.B.*, 977 F.2d 1168, 1171 (7th Cir. 1992) ("The union wanted the company's financial statements in order to establish that the company could afford to continue to pay the wages and fringe benefits fixed in the current contract. The company mooted the demand by conceding that it could afford them.").

Finally, even if the Union's position was accurate—which it was not—Respondent mooted the request by confirming its position that it merely did not want to pay. *Graphic Commc'ns Int'l Union*, 977 F.2d at 1171. Accordingly, the Union was not entitled to the requested information. Consequently, Respondent's refusal was proper and the Board should overrule the ALJ's determination to the contrary.

F. The ALJ Erred by Finding that Non-hallmark Unfair Labor Practices Tainted the Employees' Petition (Exceptions 1, 3, 63, 64 69, 71).

Despite the number of unfair labor practices alleged by the General Counsel, the ALJ found Respondent committed only a single violation that tainted the petition. The ALJ found that Respondent's failure to bargain over economic proposals coupled with its failure to respond to a comprehensive union proposal impermissibly prolonged bargaining. According to the ALJ, the prolonged bargaining caused dissatisfaction within the unit and tainted any withdrawal petition. (Decision at p. 15.) Should the Board not reverse the ALJ's finding (and recommended remedy based on that finding), it would be tantamount to a determination that Respondent engaged in bad faith bargaining – a claim that was dismissed by the Regional Director, upheld on appeal and not before the ALJ.

A petition is tainted by an unfair labor practice only when there is a causal relationship between the illegal act and the petition. The causal relationship must significantly contribute to the loss of majority support. *See St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 146-47 (D.C. Cir. 1989) (unfair labor practices must "significantly contribute to [the] loss of majority"); *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 643–44 (D.C. Cir. 2013); *Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996) ("there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.").

Even in the event that slow bargaining at the table is an unfair labor practice, it is not the type of "hallmark" violation that requires a bargaining order to invalidate the petition. Typically, to invalidate a decertification petition, an unfair labor practice must have a lasting detrimental effect such as discharge, withholding benefits, or threats. *JLL Rest., Inc.*, 347 NLRB 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1328-29 (2006) (discharging active union supporter and unilaterally

changing hours and vacation); *Goya Foods*, 347 NLRB 1118, 1121 (2006) ("hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time"); *M&M Auto. Grp., Inc.*, 342 NLRB 1244, 1247 (2004) ("changes involved the important, bread-and-butter issues of wage increases and promotions"); and *Overnite Transp. Co.* 333 NLRB 1392, 1392 (2001) (employer committed "hallmark" violations).

The ALJ's findings are not remotely similar to the required hallmark violations. The ALJ found only that Respondent committed violations by its refusals to promptly respond to proposals about economic matters until non-economic matters were complete. There is no evidence, however, to conclude that if Respondent exchanged economic proposals or made a comprehensive counter proposal after August 26, the parties would have completed bargaining by the time the petition was collected in October 2016. By the time the petition was collected in October 2016, the parties had still not completed its agreement to the *non-economic* terms, some of which they had been bargaining over for months. Yet despite these unfinished terms that the parties were willingly bargaining over, the ALJ believed bargaining would have been shorter if only the parties included more issues in bargaining. Such a proposition does not accord with the evidence in the case.

Finally, given the ALJ did not find surface bargaining or bad faith bargaining, the petition should not be considered tainted on the basis of failure to discuss certain conditions or exchange economic proposals. Such violations occurred in *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). There, the Board found the employer engaged in egregious bad faith bargaining over the course of 11 months and 21 sessions. *Id.* at 669-73. The employer demanded a broad management rights clause and a no strike clause, while refusing to agree to an effective grievance and arbitration procedure, all which would have had the effect of stripping the union of any effective method of

representing the unit. *Id.* at 669-71. Here, Respondent is not insisting on unilateral control over virtually all significant terms of employment, which would leave the Union and employees with few rights or protections. Indeed, bargaining between August 2016 and the November withdrawal actually showed a greater amount of progress than the entire prior year, a fact correctly acknowledged by the ALJ. (Decision p. 3, line 10.) Based on the record, there is no evidence of taint that is causally related to the decertification petition.

G. The ALJ's Recommendation of a 6-Month Bargaining Order is Improper; If Anything, There Should Be an Election (Exceptions 81-82).

Even assuming, *arguendo*, that Respondent's withdrawal of recognition was improper (which, as discussed in detail above, it is not), the ALJ erred by imposing an order requiring Respondent to bargain with the Union. (Decision at p. 17.) To the extent Board law currently requires a bargaining order as a remedy for a Section 8(a)(5) violation, it should be changed and overruled. The Board should adopt the three-part test articulated by the D.C. Circuit.[20]

"[A] bargaining order is not a snake-oil cure for whatever ails the workplace[.]" *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991). It therefore should be prescribed only when the employer has committed a "[h]allmark violation[ ]" of the Act. *Id.* at 934, 936. It should not be imposed if the violation is "far from serious." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996). Severity depends on whether the ULP was "the genesis of [the] employees' desire to rid themselves of" the union, *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 502 (5th Cir. 1972),

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[20] That three part test balances: (1) the employees' Section 7 rights of self-organization and collective bargaining; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act. See generally *Scomas of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017).

and whether it was so "flagrant" that an election cannot fairly be held, *id.* at 503 (internal quotation omitted).

This case is similar to *Scomas of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). In *Scomas*, employees collected a majority decertification petition, filed it with the NLRB region for an election, and gave a copy of the petition to their employer, asking it to withdraw recognition. 849 F.3d at 1147. Before the employer withdrew recognition, the union persuaded six employees to sign a form stating they revoked their decertification signatures. *Id.* at 1153. Without those six signatures, the decertification petition lost majority support, but was still supported by well over 30% of the bargaining unit. *Id.* at 1158. The union concealed the employees' revocation from the employer (and the employee who filed for an NLRB election). The employer withdrew recognition in good faith based on the majority petition and, based on this withdrawal, the petitioner withdrew her election petition. *Id.*

Six days later, the union filed ULP charges claiming the employer unlawfully withdrew recognition because the union still maintained majority support. The Board found that the employer violated the Act and imposed a bargaining order to prevent the employer and the dissenting employees from "raising a question concerning the Union's majority status during the required bargaining period." *Id.* at 1154. The D.C. Circuit reversed the Board's bargaining order, noting that an "affirmative bargaining order is an extreme remedy, because according to the time-honored board practice it comes accompanied by a decertification bar that prevents employees from challenging the Union's majority status for at least a reasonable period." *Id.* at 1156 (quoting *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1122 (D.C. Cir. 1994)). The Court even noted that the

appropriate remedy for such a situation is to order an election when more than 30% of the employees still support the petition. *Scomas*, 849 F.3d at 1156.[21]

Even if the petition did not command a majority, the ALJ still found 16 of the 43 employees objectively supported the Union's decertification. As more than 30% of the unit supports getting rid of the Union, there is a substantial question concerning representation that should be decided by an election.

Given the still substantial opposition to the Union, imposition of a bargaining order would impermissibly undermine the Section 7 rights of the employees. The ultimate issue in this case is the employees' right to be represented by an organization of their own choosing. "The fundamental policies of the Act are to protect employees' rights to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships." *HTH Corp.*, 356 NLRB 1397, 1428 (2011), *citing Levitz*, 333 NLRB at 723. A bargaining bar would prevent the employees' from "dislodge[ing] the union" no matter "their sentiments about it." *Scomas*, 849 F.3d at 1156 (quoting *Caterair Int'l*, 22 F.3d at 1122). Given the substantial evidence that so many of Respondent's employees are opposed to Union representation, an election should be the required remedy to any unfair labor practice so the employees can properly decide for themselves whether or not they wish to be represented by the Union. Imposing a bargaining order "give[s] no credence whatsoever to employee free choice" and would "handcuff" the employees "for no good record-based reason." *Scomas*, 849 F.3d at 1158.

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[21] Interestingly, the Board can take judicial notice of its own records to see that when an election was finally held in *Scomas* (instead of an oppressive bargaining order being crammed onto the employees), the union lost by an overwhelming vote of 37-12. Case No. 20-RD-215834.

IV. CONCLUSION

The ALJ's rulings, findings, and conclusions invalidating the petition presented to Respondent demanding that Respondent withdrawal recognition of the Union are in error. Likewise, the ALJ's rulings, findings and conclusions with respect to Respondent's alleged refusal to bargain over economic issues and refused to provide a comprehensive response to the Union's comprehensive proposal, and that these violations would have tainted any petition, that Respondent violated the Act when it refused to provide confidential sales and customer information requested by the Union, are factually unsupported by the record and inconsistent with Board precedent. Accordingly, the Board should reverse the ALJ's decision in its entirety. In the alternative, the Board should order that an election be held so that the employees' Section 7 rights can be honored.

Dated: September 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2018, I e-filed the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** with the National Labor Relations Board's Office of the Executive Secretary, and served a copy of the foregoing document via e-mail to all parties in interest, as listed below:

Mr. Dennis P. Walsh
Regional Director
NLRB – Region 4
Dennis.Walsh@nlrb.gov

Antonia O. Domingo, Esquire
Nathan Kilbert, Esquire
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EXHIBIT A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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March 1, 2017

Mr. Nathan Kilbert
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Manufacturing, Energy, Allied-Industrial and Service
Workers International Union, AFL-CIO/CLC
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Pittsburgh, PA 15222

Re: Wyman Gordon Tru-Form
Case 04-CA-188990

Dear Mr. Kilbert:

We have carefully investigated and considered your charge that Wyman Gordon Tru-Form has violated the National Labor Relations Act.

Decision to Partially Dismiss: Based on the investigation, I have decided to dismiss the portions of the charge alleging that the Employer violated Section 8(a)(1) and (5) of the Act by making unilateral changes to the employee health care premiums in June 2016, paying Quarterly Cash Bonuses to employees on August 15 and October 26, 2016 without bargaining over discretionary components of the bonuses, and failing to bargain in overall good faith with United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union (the Union). I am also dismissing the portion of the charge alleging that the Employer violated Section 8(a)(1) and (3) of the Act by singling out two employees for discipline in retaliation for their Union activities.

Regarding the alleged unilateral changes to health insurance premiums, the investigation revealed that on May 16 and 26, 2016, the Employer and Union bargained over changes to the premiums, although no agreement was reached. On June 3, 2016, the Employer announced the amount of the premium changes to the employees, and informed employees and the Union that those changes were subject to continued bargaining with the Union and could change depending on the outcome of bargaining. On June 13, 2016, the Employer offered to continue bargaining with the Union over the healthcare premiums. It is undisputed that the Union chose not to bargain further on this issue and indicated on June 13 and times thereafter that it accepted the Employer's health insurance premium increase.

Regarding the alleged failure to bargain concerning the discretionary components of the Quarterly Cash Bonuses (QCBs) before awarding QCBs to unit employees, the investigation established that the Employer has an established formula which it uses to calculate the amount of the bonuses and there is insufficient discretion in the formula itself to require bargaining with the Union.

Regarding the allegation that the Employer failed to bargain in overall good faith, the Union contended during the investigation that the Employer's bad faith was evidenced by its cancellation of eight bargaining sessions, obstruction in scheduling bargaining sessions, excessive caucuses, and "unreasonable" and/or regressive bargaining proposals with respect to the Union Security, Plant Rules, Job Posting and Bidding, Management Rights, Layoffs, and Seniority provisions. The investigation disclosed that throughout bargaining, the Employer adhered to the parties' bargaining ground rules by scheduling bargaining sessions in advance and providing at least 24-hours' notice of any cancellations. Moreover, five of the eight bargaining cancelled sessions were rescheduled within a week of the originally scheduled date. While the Union asserted that the Employer was aware of the Union's Lead Negotiator Joe Pozza's busy schedule and asserted that every cancelled session ran the risk of becoming a lost session, it is well settled that a party acts at its peril when it chooses as a bargaining agent someone who is encumbered by other conflicts which limit his availability. *Nursing Center at Vineland*, 318 NLRB 901, 905 (1995); *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); and cases cited therein.

With respect to caucusing, the parties had agreed in their bargaining ground rules that "each party has the right to caucus at any time..." and, although the ground rules also indicated that "the requesting party will inform the other party of the anticipated length of the caucus," the evidence revealed that the parties did not always adhere to this portion of the ground rules by informing each other of how long each caucus should last. Thus, though the Union felt that certain of the Employer's caucuses lasted longer than the Union felt necessary, there is insufficient evidence that the Employer was engaging in bad faith bargaining as a result of its caucuses.

The evidence established that with regard to the Union's contention that the Employer made "unreasonable" or regressive proposals, the Employer made several concessions on Union Security, shortening the period of days of employment required before an employee must pay union dues, and it clarified its position and proposals on Plant Rules when the Union informed it of inconsistent language in its proposals. With regard to negotiations regarding Job Posting and Bidding, the parties never reached a tentative agreement on this provision, and while the Employer did propose different language in its fourth proposal on this subject than it did in prior proposals, that alone does not establish regressive bargaining. With regard to bargaining over the Seniority and Layoffs provisions, there is no legal requirement that an an employer has to agree to seniority as a deciding factor for layoffs, job bidding, or any other term, and the Employer was simply seeking to include other factors in addition to seniority. Finally, with regard to the Employer's Management Rights proposal, the proposal was not atypical or unlawful and notably did not limit any other rights the Union may have obtained under the CBA; the Union also could have provided a counter offer in an attempt to modify any language to

which it did not agree. As such, I find the Employer engaged in hard, not regressive, bargaining and did not engage in unlawful bad faith bargaining in violation of Section 8(a)(5) of the Act.

With respect to the allegation that the Employer issued unlawful discipline to employees Chad Palmer and Gerald Ziminskas on October 18, 2016, the investigation revealed insufficient evidence to establish that the union activity of either employee was a motivating factor in the issuance of their discipline. While Ziminskas served as a Local Unit official and attended bargaining sessions with the Union, and the Employer was aware of those activities, there is insufficient evidence to find that Palmer engaged in recent union activity since 2014 or that the Employer knew of any such activity. Even assuming, *arguendo*, that these employees' union activity was a factor, the Employer met its burden to show that it would have taken the same action even absent any union activity as there was no evidence that they were treated differently from others for the same infraction. *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

Thus, the Employer did not violate Section 8(a)(1), (3) or (5) of the Act with respect to the above allegations. Accordingly, I am refusing to issue Complaint on these portions of the charge. All other portions of the charge remain pending.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **E-File Documents,** enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel** at the **National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **Wednesday, March 15. 2017.** If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than **Tuesday, March 14, 2017. If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely**. If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so, and the request for an extension of time is **received on or before Wednesday, March 15, 2017.** The request may be filed electronically through the ***E-File Documents*** link on our website www.nlrb.gov, by fax to (202) 273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after **Wednesday, March 15, 2017, even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

DENNIS P. WALSH
Regional Director

Enclosure
cc: Brad Georgetti
Wyman Gordon Tru-Form
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EXHIBIT B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570

June 29, 2017

CORRECTED COPY

NATHAN KILBERT
UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
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ALLIED-INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC
60 BLVD OF THE ALLIES
FIVE GATEWAY CENTER RM 807
PITTSBURGH, PA 15222

Re: Wyman Gordon Tru-Form
Case 04-CA-188990

Dear Mr. Kilbert:

Your appeal from the Regional Director's partial dismissal has been carefully considered. The appeal is denied substantially for the reasons in the Regional Director's letter of March 1, 2017. On appeal, you contend that the Regional Office did not adequately conduct the investigation, nor did the Regional Director give enough weight or consideration to the Employer's unlawful conduct found in this and other pending related cases. We conclude that the Regional Office conducted the investigation in accordance with the Agency's policies and procedures. The Regional Director properly based the dismissal on the evidence presented by the parties and the case law. Based on the foregoing, we do not find that the Employer engaged in bad faith bargaining, as found by the Regional Director in his letter dated March 1, 2017.

The denial of this appeal does not affect the remaining allegations contained in the above unfair labor practice charge.

Sincerely,

Richard F. Griffin, Jr.
General Counsel

Mark E. Arbesfeld

By: _____
Mark E. Arbesfeld, Acting Director
Office of Appeals

cc: DENNIS P. WALSH
REGIONAL DIRECTOR
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